TABLE OF CONTENTS

Page

Appendix A: Opinion of Supreme Court of Arizona in *Aitken v. Industrial Commission* (filed October 17, 1995) A-1

Appendix B: Opinion of the Court of Appeals in *Arizona in Aitken v. Industrial Commission*, (filed May 14, 1992) A-17

Appendix C: Decision Upon Review Affirming Findings and Award Establishing Third Party Lien (Filed August 6, 1991) A-26

Appendix D: Findings and Award Establishing Third Party Lien (Filed May 8, 1991) A-28

Appendix E: Supreme Court of Arizona Clerk's Notice of Order Denying Motion for Reconsideration, dated December 21, 1995 A-36

Appendix F: Mandate, dated January 18, 1996 A-38

Appendix G: Constitutional Provisions, Statutes, and Rules Involved

1. Fifth Amendment to the United States Constitution A-40

2. Fourteenth Amendment to the United States Constitution A-40

	Page
3. 28 U.S.C. 1257	A-42
4. 28 U.S.C. § 2403(b)	A-42
5. Ariz.Rev.Stat.Ann. § 12-2506 (prior to 1993 amendments, and in effect when the administrative law judge issued his Findings and Award on May 8, 1991, and his Decision upon Review Affirming the Award, on August 6, 1991, and when the Arizona Court of Appeals issued its opinion in *Aitken v. Industrial Commission* on May 14, 1992)	A-43
6. Ariz.Rev.Stat.Ann. § 12-2506 (with 1995 amendments, in effect when Supreme Court of Arizona issued its opinion in *Aitken v. Industrial Commission* on October 17, 1995.)	A-45
7. Ariz. Rev. Stat. Ann. § 23-1023	A-48
8. Rule 22, 17B, Ariz.Rev. Stat.Ann, Arizona Rules of Civil Appellate Procedure (including historical notes)	A-50

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ARIZONA

FAITH AITKEN,

Petitioner Employee,

v.

INDUSTRIAL COMMISSION OF ARIZONA

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Supreme Court
No. CV-92-0257-PR

Court of Appeals
No. 2 CA-IC 91-0042

Industrial Commission
No. 374-78-9448

Carrier
No. A056140

O P I N I O N

[Filed October 17, 1995]

Appeal from the Industrial Commission
Administrative Law Judge Jerry C. Schmidt
AWARD SET ASIDE

Opinion of the Court of Appeals, Division Two
173 Ariz. 300, 842 P.2d 1313 (Ct. App. 1992)
VACATED

Dee-Dee Samet, P.C.
by Dee-Dee Samet and Arthur V. Gage
Tucson

-and-

Gerald T. Barton
Tucson

-and-

Robert Q. Hoyt, P.C.
by Robert Q. Hoyt
Tucson

Attorneys for Petitioner

Bury, Moeller, Humphrey & O'Meara
by J. Michael Moeller and Roger W. Frazier
Tucson

Attorneys for Unigard Insurance and
Amphitheater Public Schools

The Industrial Commission of Arizona
by Anita R. Valainis, Chief Counsel
Phoenix

Plattner Verderame, P.C.
by Frank Verderame Phoenix

-and-

The Langerman Law Offices
by Amy G. Langerman Phoenix

Attorneys for Amicus Arizona Trial Lawyers
Association

J. Stephen Dix, P.C.
by Robert J. Forman Tucson
Attorney for Amicus Southern Arizona Workers' Compensation Claimant's Attorneys Association

OPINION

ZLAKET, Justice.

Petitioner, Faith Aitken, while in the scope of her employment with Amphitheater School District, was seriously injured when she fell in an area where a sidewalk had been removed by Maya Construction Company. She filed a workers' compensation claim and received $28,929.70 in benefits from her employer's carrier, Unigard Insurance Co. She also filed a third party suit against Maya, which responded by alleging her contributory negligence and naming the school district a nonparty at fault.

A jury in the third party action assessed total damages of $319,292 and apportioned responsibility as follows: 65% to Maya, 25% to Amphitheater, and 10% to Aitken. After reducing the award by the employer's and Aitken's percentages of fault, the court entered judgmentnt against Maya in the amount of $207,350.[1]

---

[1] The reduction amounted to $79,823 for Amphitheater's negligence and $31,929 for Aitken's. The reader with an eye for detail may note that when the sum of these two numbers is subtracted from the verdict, the remainder is $207,540 rather than the judgment amount of $207,350. We can find no explanation in the record for this minor discrepancy, but it is unimportant to our decision.

From this sum, petitioner reimbursed Unigard $28,929.70 for benefits previously collected. The carrier thereafter claimed a lien credit against future compensation of $74,466.54, the amount remaining from the recovery after deductions for attorneys' fees and costs.

Aitken asserted that both the lien and the credit were excessive. She also challenged their constitutionality under Article 18, Section 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."); Article 18, Section 8 (requiring the establishment of "a just and humane compensation law ... for the relief and protection of [injured or deceased] workmen, their widows, children or dependents ... from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefor"); and Article 2, Section 31 ("No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person.") of the Arizona Constitution. More particularly, she argued that the lien statute, A.R.S. § 23-1023(C), operates in combination with a more recent measure abolishing joint and several liability, A.R.S. § 12-2506, to produce an unconstitutional result.

The administrative law judge found in favor of the carrier, holding that the lien could not be reduced merely because the insured employer shared responsibility for petitioner's injuries. The court of appeals affirmed, finding that an injured worker who has received compensation must fully reimburse the carrier even though the total damages assessed in a third party action

have been diminished by the employer's percentage of fault. Aitken v. Industrial Comm'n, 173 Ariz. 300, 302, 842 P.2d 1313, 1315 (Ct.App.1992). We granted review.

A. Constitutionality of A.R.S. Sec. 23-1023

We "usually will not determine the constitutionality of a statute when the case can be decided without ruling upon such question." State v. Church, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973).

> Indeed, it is well-settled that the constitutionality of a statute will not be determined in any case, unless such determination is absolutely necessary in order to determine the merits of the suit in which the constitutionality of such statute has been drawn in question, and such rule should not be departed from except for strong reason and under extraordinary circumstances.

County of Maricopa v. Anderson, 81 Ariz. 339, 341, 306 P.2d 268, 269 (1957) (quoting 16 C.J.S. Constitutional Law § 94, at 307). We do not find these circumstances to be present here.

Consistent with our "duty to construe a statute so as to give it, if possible, a reasonable and constitutional meaning," Arizona Downs v. Ariz. Horsemen's Found., 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981), we must make every effort to harmonize these legislative acts. Fortunately, because the underlying purposes of the lien statute and the broader objectives of the workers' compensation scheme are clear and well understood, we

are able to reach a reasonable interpretation of the law that comports with legislative intent without having to address the foregoing constitutional challenges.

B. Interpreting the Lien Statute

In addition to collecting workers' compensation benefits, an injured employee may sue a third party who caused or contributed to his or her injuries. A.R.S. Sec. 23-1023(A). If the employee successfully recovers against the third party tortfeasor, Sec. 23-1023(C) allows the employer or its carrier to assert a lien on the recovery. This lien applies to "the total recovery less the reasonable and necessary expenses, including attorneys' fees." A.R.S. § 23-1023(C). Before the legislature abolished or severely restricted joint and several liability in A.R.S. § 12-2506, a literal reading of the lien statute did not detract from the overall purpose of the workers' compensation scheme, which is to protect injured employees. See Stephens v. Textron, Inc., 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980); State ex rel. Industrial Comm'n v. Pressley, 74 Ariz. 412, 418, 250 P.2d 992, 996 (1952). Those who paid compensation obtained liens on "total" recoveries from third party tortfeasors who were, under the law existing at the time, responsible for all damages regardless of how big or small their respective portions of liability might have been. Thus, even when employers shared responsibility for the injuries, their employees received a full measure of damages from third parties whose conduct contributed to the result.

The law has changed. Joint and several liability has been effectively abrogated. Moreover, in Dietz v. General Elec. Co., 169 Ariz. 505, 510, 821 P.2d 166, 171

(1991), we held that under A.R.S. Sec. 12-2506(B) an employer liable for workers' compensation can be designated a nonparty at fault in a claimant's suit against a third party. Therefore, judges or juries in such cases must now assign, when appropriate, a percentage of fault to the employer. As we recognized in Dietz, although this method of apportionment is in accord with the overall legislative objective of holding parties liable only for their own wrongdoing, it may work an injustice on claimants in the lien context. Id. at 511, 821 P.2d at 172. Once employees accept compensation, they give up their rights to sue negligent employers. See A.R.S. § 23-1022(A). Yet, without an equitable adjustment or apportionment, employers and their carriers will continue to obtain full liens against third party recoveries even where those awards have been effectively reduced by virtue of the employers' own fault. The result is a diminution of the injured claimant's total recovery that appears quite inconsistent with the overall goal of Arizona's compensation scheme.[2]

We are not alone in this view. Our court of

---

[2] In the instant case, for example, not only are the Aitkens unable to sue Amphitheater to recover the 25% of their damages attributable to the school district's conduct, but under the appellate court's present construction of A.R.S. § 23-1023(C), they must fully reimburse the district's carrier, Unigard, for benefits already received. Moreover, Unigard is able to assert a lien against the Aitkens' recovery for compensation benefits it may be obligated to pay in the future, without any deduction for its insured's contribution to the injuries.

appeals pointedly questioned "the equity of this outcome--that the employee, whose damages have already been reduced by 25%, reflecting Amphitheater's proportionate share of fault, must nevertheless reimburse Amphitheater's carrier for 100% of the benefits received." Aitken, 173 Ariz. at 302, 842 P.2d at 1315. And in Sullivan v. Scoular Grain Co., 853 P.2d 877 (Utah 1993), where the court held that Utah's Liability Reform Act requires a jury to apportion the fault of a plaintiff's employer even though the latter is immune from suit under workers' compensation laws, the majority candidly noted:

> Plaintiff also protests the detrimental effect on his recovery created by the employer reimbursement provisions of the Workers' Compensation Act. Section 35-1-62 provides for an employer or insurer to obtain reimbursement for any payments made to an injured employee. This lien is not reduced in any respect by the amount by which the employer's act or omission contributed to the employee's injuries....
>
> Consequently, when a verdict is granted to the plaintiff in an amount equal to or greater than the employer's workers' compensation payments, the Act allows an at-fault employer to escape liability altogether at the expense of the injured employee. We agree with plaintiff that this result is inequitable, but the effect of the statutory language is clear.

Id. at 883 (emphasis added) (footnote omitted).

The dissent in Sullivan expressed the thought more strongly:

> Thus, not only is the plaintiff made responsible for the employer's proportionate share of fault, but he must also reimburse his employer out of his diminished recovery for any workers' compensation benefits received. This is not only unjust and inequitable, but might well be unconstitutional.

853 P.2d at 887 (Stewart, J., dissenting) (emphasis added).

In Taylor v. Delgarno, 100 N.M. 138, 667 P.2d 445 (1983), the Supreme Court of New Mexico, by a 3-2 vote, opted to leave a similar issue to the legislature. The dissenting justices, however, saw no reason for judicial inaction and commented:

> We would therefore hold that the comparative negligence doctrine should be read in conjunction with the workmen's compensation statutes to require that an employer or its workmen's compensation carrier should be reimbursed from monies recovered by the injured workman from a third-party tort-feasor only in those instances where the employer or its insurer has paid more than its proportionate share of the employee's damages. On no occasion would the employer or its insurer be subjected to greater liability than that allowed by the Workmen's Compensation

> Act. There should, of course, be no reimbursement in those cases in which the employer's share of liability is greater than or equal to the amounts paid under workmen's compensation because such reimbursement would be at the expense of the injured worker. Reimbursement to a negligent employer or its insurer should occur only when the amounts paid in workmen's compensation benefits exceed the employer's proportionate share of liability and the employee is able to recover additional sums from a third-party tort-feasor because only in this instance would the employee enjoy a double recovery. Reimbursement to a negligent employer or its insurer in any other instance would be at the expense of the injured workman and would allow a negligent employer to escape even the limited liability imposed by the Workmen's Compensation Act.

667 P.2d at 449-50 (Payne, C.J., and Sosa, J., dissenting).

We concur that this issue is capable of judicial resolution, particularly given our past knowledge of and experience with the lien statute. See, e.g., Carter v. Industrial Comm'n, 182 Ariz. 128, 893 P.2d 1291 (1995); Liberty Mut. Ins. Co. v. Western Cas. & Sur. Co., 111 Ariz. 259, 527 P.2d 1091 (1974). Here, we do not deal with some novel, untested law. We know exactly how A.R.S. Sec. 23-1023(C) is supposed to operate and what it was designed to accomplish because we have been working with and applying it since its enactment in the

mid-1960s. We agree with the court of appeals that when the Arizona legislature passed this statute, it did not anticipate the manner in which compensation liens would operate outside the universe of joint and several liability,[3] which continued to exist as the law in this state for another twenty-two years. Nor is there evidence that the legislature considered this question in 1987 when A.R.S. Sec. 12-2506 was adopted. In fact, some might argue that we created the "problem" by our 1991 decision in Dietz and, therefore, that it should be amenable to a judicial solution. In any event, we cannot agree with the suggestion that our courts are powerless to compensate for the clearly unintended consequences of these recent developments in the law, by which a reimbursement mechanism that has been fairly and successfully applied for decades is effectively subverted. Courts should not limit themselves to the rigid construction or application of a statute when significant changes in circumstance since its enactment produce results plainly contrary to legislative intent. Consumers Union v. Heimann, 589 F.2d 531, 534 (D.C.Cir.1978) (citing Perry v. Commerce Loan Co., 383 U.S. 392, 397-400, 86 S.Ct. 852, 855-57, 15 L.Ed.2d 827 (1966)). "Construing a statute in light of subsequent events is fully consistent with our obligation to carry out Congress['s] intent at the time of enactment." Idaho v. Hodel, 814 F.2d 1288, 1298 (9th Cir.) (Reinhardt, J., concurring and dissenting), cert. denied sub nom. Coeur D'Alene Tribe v. Idaho, 484 U.S. 854, 108 S.Ct. 159, 98 L.Ed.2d 114 (1987). It is clear that in adopting A.R.S. § 23-1023, the legislature wanted to encourage suits against culpable third parties, thereby relieving some of the compensation burden on employers,

---

[3] See Aitken, 173 Ariz. at 303, 842 P.2d at 1316.

their insurance carriers, and the system. Liens against third party awards not only facilitate the spreading of loss but provide a valuable safeguard against double recoveries by claimants. Henshaw v. Mays, 20 Ariz.App. 300, 306, 512 P.2d 604, 610 (1973).

Thus, a reasonable balance between the rights of employer and employee, consistent with the underlying goals of the compensation scheme, has existed for more than twenty years. That balance appears to have been skewed by the almost complete abolition of joint and several liability. We recognized this dilemma in Dietz and specifically left open the possibility of limiting a carrier's lien when its insured, the employer, is found at fault to some degree. 169 Ariz. at 511, 821 P.2d at 172. We now hold that a carrier may assert a lien on a third party recovery only to the extent that the compensation benefits paid exceed the employer's proportionate share of the total damages fixed by verdict in the action. In doing so, we are particularly mindful of the "context, subject matter, and effects and consequences of the statute." Calvert v. Farmers Ins. Co., 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985). We interpret and apply laws so as to further "the general legislative goals that can be adduced from the body of legislation in question." Dietz, 169 Ariz. at 510, 821 P.2d at 171. One of the fundamental objectives of the legislature in abolishing joint and several liability was to make each tortfeasor responsible for his or her share of fault. Id.

Moreover, we have consistently applied workers' compensation laws liberally, remedially, and in a manner ensuring that injured employees receive maximum available benefits. See, e.g., English v. Industrial Comm'n, 73 Ariz. 86, 89, 237 P.2d 815, 817 (1951);

Pressley v. Industrial Comm'n, 73 Ariz. 22, 28, 236 P.2d 1011, 1015 (1951). The overriding theme of the system, as evidenced by our constitution, statutes, and case law, has been to preserve a claimant's opportunity to be made whole to the fullest possible extent--nothing more nor less.

At the same time, the lien statute acts to promote fairness among all parties. That goal is not served by allowing "an employer to benefit from his own wrong, at the expense of the injured worker," nor is such a scenario "consistent with the principles of comparative fault." Clark v. Pacificorp, 118 Wash.2d 167, 822 P.2d 162, 174 (1991). There is no indication that the statute was intended to result in a windfall for any party, be it the employee, employer, or insurance carrier. We should therefore continue to interpret it in a manner that achieves the legislative objectives of distributing responsibility according to fault and avoiding double recovery while ensuring full and fair recompense. Because any other interpretation "would be at the expense of the injured workman," Taylor, 100 N.M. at 143, 667 P.2d at 450 (Payne, C.J., and Sosa, J., dissenting), we conclude that the lien and any future credit should apply only to the extent that compensation benefits paid exceed the negligent employer's proportionate share of the total damages awarded in the third party action. In other words, the employee should not be forced to endure the combined effect of first having his or her award reduced by reason of the employer's fault, and thereafter having to satisfy a lien against this diminished recovery in favor of the employer and its carrier to the full extent of compensation benefits provided. If injured claimants stand to gain little or nothing by invoking both the workers' compensation and the tort systems, there will

scarcely be any incentive for them to pursue responsible third parties.

Respondents argue that we should uphold the right to complete reimbursement because a purpose of the lien statute is to protect the compensation fund and prevent workers from becoming public charges. If we do not allow the employer or its carrier to recoup all benefits paid, respondents assert, the compensation fund might soon be exhausted. There is, however, no evidence in the record to support such a gloomy prediction. The argument also overlooks the fact that replenishing the fund was only one of the reasons that the legislature provided for a carrier's lien. It primarily sought to prevent employees from receiving a double recovery and "to avoid the possibility that no action would ever be instituted against the third party tortfeasor." Henshaw, 20 Ariz.App. at 306, 512 P.2d at 610.

Respondents further claim that the language of A.R.S. § 12-2506(B) prohibits using a nonparty's fault in determining the amount of the carrier's lien. What the statute actually provides, however, is that "[a]ssessment of fault against nonparties does not subject any nonparty to liability in this or any other action and it may not be introduced as evidence of liability in any action." (Emphasis added.) Reducing the lien based on the employer's proportionate share of fault does not subject the employer to any liability; it merely affects the amount of reimbursement the employer or its carrier receives. See Taylor, 100 N.M. at 142, 667 P.2d at 449 (Payne, C.J., and Sosa, J., dissenting).

Respondents finally assert, as the court of appeals concluded, that the proposed construction of the lien

statute injects fault into a no-fault scheme. However, in the context of efficiently and expeditiously providing compensation to injured workers, which is what the system is designed to do, fault remains no consideration. In third party suits, fault has always been a matter of inquiry and remains so. Despite the fact that it is now appropriate for fact finders to apportion fault among all of the various parties and nonparties in tort actions, today's ruling changes none of the traditional principles governing the payment of compensation; only the amount of reimbursement is affected. But even assuming that, to a limited extent, fault is brought into play by such an adjustment, the result is nevertheless reasonable and compatible with the need for a "just and humane compensation law in the State of Arizona." Ariz. Const. art. 18, § 8.

In adopting a rule of equitable apportionment, we are able to avoid a constitutional attack on the lien statute and preserve its primary justification--the fullest available recovery without double recovery. Respondents' suggestion that our decision constitutes a rewriting of A.R.S. § 23-1023 is without merit. We are simply making it function as closely as possible to the way in which it has always operated and in accord with what appears to have been the intent of the legislature at the time of its passage. It makes little sense to say that rules of construction prevent us from applying a statute in a manner consistent with its application and use these past many years. We find nothing to indicate that the legislature was unhappy with or intended to change the way in which the lien statute had been working. However, if our decision today misconstrues legislative intent, that body can tell us so by taking appropriate action.

The award is set aside, the opinion of the court of appeals is vacated, and the case is remanded.

Thomas A. Zlacket, Justice.

CONCURRING:

Stanley G. Feldman, Chief Justice

James Moeller, Vice Chief Justice

Robert J. Corcoran, Justice

Frederick J. Martone, Justice

APPENDIX B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

Faith Aitken
Petitioner Employee

CA-IC 91-0042
DEPARTMENT A

v.

OPINION

Industrial Commission of Arizona
Respondent

[Filed May 14, 1992]

Amphitheater Public Schools,
Respondent Employer,

Unigard Insurance Company,
Respondent Carrier.

Special Action - Industrial Commission
ICA Claim No. 374-78-9448
Carrier No. A065140
Administrative Law Judge Jerry C. Schmidt
AWARD AFFIRMED

Dee-Dee Samet, P.C.
by Arthur V. Gage
Tucson
Gerald T. Barton
Tucson
Robert Q. Hoyt
Tucson
Attorneys for Petitioner Employee

Bury, Moeller, Humphrey & O'Meara
by J. Michael Moeller and Roger W. Frazier
Tucson
Attorneys for Respondent Employer and Respondent Carrier

Anita R. Valainis, Chief Counsel
Industrial Commission of Arizona
Phoenix
Attorney for Respondent

L I V E R M O R E, Chief Judge

Faith Aitken was employed by Amphitheater School District when she fell after stepping out of a doorway into an area where the sidewalk had been removed by Maya Construction Company. She filed a claim for workers' compensation benefits and has to date received $28,929.70 in medical and compensation benefits from Unigard Insurance, Amphitheater's insurance carrier. She, and her husband asserting loss of consortium, then filed a third-party negligence claim against Maya Construction. Maya Construction in turn

alleged comparative negligence and brought Amphitheater in as a non-party at fault. The jury awarded the plaintiffs $319,292 in damages and assessed the percentage of fault as 65% Maya's, 25% Amphitheater's, and 10% Aitken's. Reducing the judgment by $79,823 and $31,929 respectively for Amphitheater's and Aitken's comparative negligence, the court awarded Aitken and her husband "jointly and equally as husband and wife" the sum of $207,350. From this judgment Aitken reimbursed Unigard the $28,929.70 it had paid in benefits, but objected to Unigard's claim of credit in the amount of $74,466.54[4] against future benefits. She requested a hearing, arguing that the lien was too high given the employer's degree of fault, was unconstitutional, and should not attach to the husband's portion of the award for loss of consortium. The administrative law judge found in favor of Unigard, holding that the carrier's lien cannot be reduced by the employer's degree of fault and that it attaches to the husband's award for loss of consortium. The award was affirmed on review.

In this special action Aitken raises three issues for review: whether the carrier's lien is limited to the amount of benefits paid which exceed the employer's proportional share of damages, whether the lien provisions of A.R.S. § 23-1023 violate the non-abrogation and non-limitation clauses of Arizona's Constitution, and whether the lien extends to a spouse's loss of consortium award absent a claim of death benefits.

---

[4]/[Footnote 1 in opinion] This sum was arrived at by deducting from the $207,350 award the $28,929.70 reimbursed to Unigard as well as attorneys' fees and costs.

In Arizona, a worker who does not opt out of the workers' compensation scheme before being injured accepts workers' compensation as his or her sole remedy against the employer. Ariz. Const. art. 18, § 8; A.R.S. §§ 23-906(A) and 23-1022. By so doing, the worker gives up the right to sue the employer and the prospect of a large damage award in exchange for prompt, though limited, compensation.[5] The employee remains free to sue a third party for its negligent contribution to the injury, but the employer or its carrier has a lien on any damages recovered to the extent of the benefits paid, as well as a credit against future benefits to the extent of the recovery. A.R.S. § 23-1023. The lien, which is levied in part for the purpose of preventing double recovery by the injured worker, applies to "the amount actually collectable" from the third party recovery, defined by A.R.S. § 23-1023(C) as being "the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery."

The Uniform Contribution Among Tortfeasors Act (UCATA), A.R.S. §§ 12-2501 et seq., enacted in 1984, allowed a defendant to recoup damages it paid to a plaintiff from other joint tortfeasors, but specifically prevented joint tortfeasors from asserting contribution

---

[5]/ [Footnote 2 in opinion] Historically, the employer in turn gave up its right to common law defenses against the employee in return for limited liability. As Arizona is now a pure comparative negligence state and no longer recognizes the "unholy trinity" of contributory negligence, assumption of the risk, and the fellow servant doctrine, the exchange is, arguably, less than equal.

claims against employers, who were statutorily immune. A.R.S. § 12-2501(H). See also Dietz v. General Electric Co., ___ Ariz. ___, 821 P.2d 166 (1991). In 1987, however, our legislature enacted § 12-2506 abolishing joint liability and adopting instead a pure comparative fault system whereby the fault of all tortfeasors is considered "regardless of whether the person was, or could have been, named as a party to the suit." A.R.S. § 12-2506(B). Finding that this latter statute prevails over § 12-2501(H), prohibiting the assessment of non-party fault against immune employers, our supreme court in Dietz, supra, held that "[w]hen an employer negligently contributes to an employee's injury, the joint tortfeasors may require the employer's negligence to be considered for the assessment of fault under A.R.S. § 12-2506." Dietz, ___ Ariz. at ___, 821 P.2d at 172. The court specifically left for decision at a later time the issue of whether an employer or its carrier should be reimbursed from a third-party recovery "only in those instances where the employer or its insurer has paid more than its proportionate share of the employee's damages." Id., quoting Taylor v. Delgarno Transport, Inc., 100 N.M. 138, ___, 667 P.2d 445, 449 (1983) (Payne, C.J., and Sosa, Senior J., dissenting).

The first issue we are asked to decide, therefore, is one of first impression in Arizona: Should the lien of an employer or its insurance carrier against the injured employee's recovery in a third-party action be reduced by the degree of fault attributed to the employer in that action?

Workers' compensation arose to meet the dual problems of increasing industrial injuries due to the industrial revolution, and inadequate compensation for

those injuries due to common law defenses that worked against the injured employee. Because most industrial injuries are attributable to the inherent risks of employment as opposed to anyone's fault, it developed as a no-fault system designed to shift the burden of economic loss from the individual and society as a whole onto industry. See generally 1 A. Larson, The Law of Workmen's Compensation § 4 (1990); Ossic v. Verde Central Mines, 46 Ariz. 176, 49 P.2d 396 (1935). One of the basic tenets of the workers' compensation system, therefore, is that fault not be interjected into its workings. To rule that a carrier's lien must be reduced by the employer's proportionate share of fault would do just that. Moreover, the language of § 23-1023(C) simply could not be more precise: The carrier's lien is "on the amount actually collectable" from the third party, in this case $207,350.

While we cannot help but question the equity of this outcome -- that the employee, whose damages have already been reduced by 25%, reflecting Amphitheater's proportionate share of fault, must nevertheless reimburse Amphitheater's carrier for 100% of the benefits received--we are bound by the rules of statutory construction to give effect to the clear and unequivocal meaning of the language used by the legislature. Janson v. Christensen, 167 Ariz. 470, 808 P.2d 1222 (1991). Although undoubtedly the legislature, when it enacted § 23-1023, did not have in mind its effect under a subsequent comparative negligence scheme, it is for the legislature, and not the courts, to make any necessary adjustments in the law.

Aitken argues next that § 23-1023(C) as applied in this case violates Ariz. Const. art. 18, § 6, prohibiting

the abrogation of a cause of action, and Ariz. Const. art. 2, § 31, prohibiting limitations on the amount of damages to be recovered for causing the death or injury of a person. We disagree. The constitutionality of the comparative negligence statutes allowing a plaintiff to collect from a third party only the damages for which it is responsible has been upheld by our supreme court, City of Phoenix v. Superior Court, 149 Ariz. 143, 717 P.2d 447 (1986), as has the assessment of fault against a non-party, statutorily immune employer, Dietz, supra. The court in Dietz went even further to hold that the lien provisions of § 23-1023(C) "are part of the trade-off contemplated in the constitution -- common law tort rights for no-fault workers' compensation benefits," Ariz. Const. art. 18, § 8, and "[i]n that regard, [are not] a limitation on the amount of damages recoverable...." Dietz, ___ Ariz. at ___, 821 P.2d at 172. For the same reason stated in Dietz, that Aitken had the option of suing Amphitheater and collecting the full amount of the judgment but chose instead to accept the trade-off offered by workers' compensation, we fail to see how the lien provisions abrogate Aitken's cause of action against Amphitheater. A.R.S. §§ 23-906(A) and 23-1022(A); Anderson v. Industrial Commission, 147 Ariz. 456, 461, 711 P.2d 595, 600 (1985). Practically in this case there is a potential reduction of the damages recoverable from third parties because of the application of the workers' compensation lien. That, too, it would seem is part of the constitutional trade-off.

As to the final issue, both the statutory language and the case law are clear that the carrier's lien extends to the total third party recovery, including that portion attributable to a spouse's loss of consortium. A.R.S. § 23-1023(C); Mannel v. Industrial Commission, 142 Ariz.

153, 688 P.2d 1045 (App.1984), cert. den., 469 U.S. 1212, 105 S.Ct. 1183, 84 L.Ed.2d 331 (1985). In Mannel the court held:

> If a lien is allowed, it applies to the entire third party recovery (less expense and attorney's fees), even though this recovery includes damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouses' loss of consortium).

Id. at 156, 688 P.2d at 1048. What is less clear in this particular case is whether the carrier's credit attributable to the recovery for loss of consortium offsets only future death benefits. In Martinez v. Industrial Commission, 168 Ariz. 307, 812 P.2d 1125 (App.1991), Division One of this court held that while the carrier's lien attaches to the entire recovery, the credit attributable to the recovery for loss of consortium offsets only potential future death benefits. Unlike the award here, however, which was awarded "jointly and equally" to the employee and her husband, the award in Martinez was segregated. While Aitken urges us to interpret "jointly and equally" to mean that 50% of the damages were attributable to the husband for loss of consortium, any determination to that effect should have been made in the trial court and neither we nor the administrative law judge are in a position to second-guess what was intended. We hold therefore that, as to the carrier's credit, Martinez does not apply. For the same reasons set forth above, that the employee had the option to reject workers' compensation and pursue a third-party judgment free from any employer's lien, the carrier's lien is constitutional and not an abrogation of her right to bring a claim for full damages.

Award affirmed.

_____

JOSEPH M. LIVERMORE, Chief Judge

CONCURRING:

_____

MICHAEL A. LACAGNINA, Presiding Judge

_____

LAWARENCE HOWARD, Judge

APPENDIX C

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Faith Aitken
Applicant

v.

I.C.A. Claim No. 374-78-9448
Carrier No. A065140

Amphitheater Public Schools,

Defendant Employer,

Date Of Injury: 5-18-88

Unigard Insurance Company,
Defendant Carrier.

Decision Upon Review
Affirming Findings and
Award Establishing
Third Party Lien

Heretofore, on May 8, 1991, FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN was issued by this Administrative Law Judge.

Thereafter, on June 6, 1991 REQUEST FOR REVIEW was filed by the applicant. RESPONSE TO REQUEST FOR REVIEW was filed on June 21, 1991.

This Administrative Law Judge, having fully reconsidered the file, records and all materials hereunto appertaining, now enters his DECISION UPON REVIEW AFFIRMING FINDINGS AND AWARD

ESTABLISHING THIRD PARTY LIEN as follows:

FINDINGS

The FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN hereto entered on May 8, 1991 is fully supported by the evidence and is hereby affirmed.

AWARD

IT IS ORDERED that the FINDINGS AND AWARD ESTABLISHING THIRD PARTY LIEN heretofore entered on May 8, 1991 be, and the same is hereby affirmed.

- - - - - -

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of Appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of Arizona Revised Statutes Secs. 23-951 A and 12-120.21 B. See also Rule 10, Rules of Procedure for Special Actions, Arizona Revised Statutes, 17 A. Unless such application is made within THIRTY (30) DAYS after the mailing hereof, this Decision shall be final. Arizona Revised Statutes Sec. 23-943 H.

By

_____

JERRY C. SCHMIDT
Law Judge

JCS:bes
DATED MAILED IN TUCSON, ARIZONA THIS 6TH DAY OF AUGUST 1991.

APPENDIX D

BEFORE THE INDUSTRIAL COMMISSION OF ARIZONA

Faith Aitken
Applicant

v.

Amphitheater Public Schools,
Defendant Employer,

Unigard Insurance Company,
Defendant Carrier.

I.C.A. Claim No. 374-78-9448
Carrier No. A065140
Date of Infury: 5-18-88

Findings and Award Establishing Third Party Lien

Heretofore, on June 7, 1988 the applicant filed a claim for workers' compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on May 18, 9188[sic].

The applicant's claim was accepted and remains open for benefits. On December 20, 1990 the defendant insurance carrier herein issued a Notice of Credit claiming a lien arising out of a third party civil action in Superior Court.

Thereafter, on January 14, 1991 the applicant filed a REQUEST FOR HEARING and pursuant thereto, formal hearing was scheduled to have convened in Tucson, Arizona on April 18, 1991. The applicant is represented by Mr. Arthur V. Gage while the defendants

are represented by Mr. J. Michael Moeller. Prior to the convening of formal hearing the parties stipulated to submit the matter on the basis of the material contained in the Industrial Commission file and simultaneous memoranda.

FAITH AITKEN

The undersigned, having fully considered the file, record and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On May 18, 1988 the applicant was employed by the above named defendant employer who at said time was insured under the provisions of the Arizona workers' compensation act against liability for the payment of medical, surgical, hospital and/or compensation benefits by the defendant insurance carrier herein.

2. On May 18, 1988 the applicant sustained an industrial injury while in the course and scope of her employment with the defendant employer, Amphi Public Schools. The applicant thereafter received and continues to receive Worker's Compensation benefits pursuant to the Arizona Workers' Compensation Act. The applicant then brought an action into Superior Court for damages against a third party tort feasor, Maya Construction Company. The full damages were determined to be $319,292.00, the applicant guilty of 10% comparative fault and the non-party employer guilty of 25% comparative fault. The threshold question which must be addressed is whether the carrier's lien must be reduced by the same percentage of comparative fault found in Superior Court.

3. A.R.S. §23-1023 provides:

"A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

"B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within on year after trhe[sic] cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insuran[sic] carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his dependents. After the reassignment, the employee entitled to compensation,/ or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

"C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the

> claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. the[sic] insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Comprise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim."

4. The statute specifically provides that "the amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorney fees, actually expended in securing such recovery." The Supreme Court in Stroud v. Dorr-Oliver, Inc., 112 Ariz. 403, 542 P.2d 1102 (1975) stated that:

> "...There is no provision in A.R.S. §23-1023(C) to deny an employer a lien even if the employer was contributorily negligent. The right of an employer, or its workmen's

> compensation carrier, to enforce its lein[sic] under A.R.S. §23-1023(C) against any judgment recovered by an employee in a third party action is not dependent on the employer's freedom from concurrent negligence contributing to the injury and the third party cannot assert such negligence as a defense or ask for indemnification from said employer or his carrier."

More recently the Court of Appeals in Boy v. Fremont Idem. Co., 154 Ariz. 334, 742 P.2d 835 (1987) reiterated that the insurer "shall have a lien on the amount actually collectable." The Court then went on to comment:

> "...We interpret the sttute[sic] to mean what it plainly says. Arizona courts have consistently resisted efforts to limit the insurer's lien."

5. In addition, to reduce the carrier's lien in proportion to the 25% comparative fault would be interjecting the concept of fault. It has long been recognized that in the state of Arizona, workers' compensation procedure is a no fault process and such doctrine has been eliminated in the employment setting, see Colvert v. Industrial Commission, 21 Ariz.App. 409, 520 P.2d 322 (1974).

6. A.R.S. §12-2506 which is part of the comparative negligence scheme and which specifically dealt with abolishing joint and several liability states in part:

> "Assessments of percentages of fault for non-parties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against non-parties does not subject any non-party to liability in this or any other action, and it may not be introduced as evidence of liability in any action."

Again, it can be presumed that the statute means what it plainly says.

7. In the instant case the carrier's lien cannot be reduced by the Superior Court finding of 25% comparative fault. Having so concluded there is no reason to further discuss issues 1, 3, 5, 6 and 7 set forth in the stipulation of the parties filed with the Industrial Commission on March 25, 1991.

8. As to the second issue set forth in the stipulation of March 25, 1991 it appears that the parties have agreed that $45,580.00 is not subject to nor should it e made a part of the lien.

9. The last issue which remains to be resolved is whether the workers' compensation lien attaches to a judgement for loss of consortium. This issue has been discussed, albeit, under joint and several liability legislation in Mannel v. Industrial Commission, 142 Ariz. 153, 688 P.2d 1045 (1984). The Court concluded that the compensation carrier receives "a lien in the amount actually collectable from the (third party tort feasor) to the extent of the carrier's obligation for compensation benefits." The Court stated:

> "If a lien is allowed, it applies to the entire third-party recovery (less expenses and attorneys fees), even though this recovery icludes[sic] damages not compensated under workers' compensation (such as pain and suffering, loss of pleasures in life, and a spouses's loss of consortium)."

10. The workers' compensation carrier's lien attaches to the loss of consortium claim to the applicant's husband. While this proposition should maybe revisited in light of the changes in the law it is not the prerogative of the undersigned to take such a course of action.

AWARD

IT IS HEREBY ORDERED that the worker's compensation carrier's lien shall not be reduced by the Superior Court finding the non-party employer 25% comparative negligent.

IT IS FURTHER ORDERED that Four Thousand Five Hundred Eighty and 65/100 Dollars ($4,580.65) is not subject to the lien nor is it a part thereof.

IT IS FURTHER ORDERED that the workers' compensation carrier's lien attaches to the loss of consortium judgment in favor of the applicant's husband.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of the Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided for by Arizona Revised Statutes, Secs. 23-942 D and 23-943 A and B.

Unless such written request is made within the time provided, this Award is final.

By_____
JERRY C.
SCHMIDT
Administrative Law
Judge

JCS:bes
DATED AND MAILED IN TUCSON, ARIZONA THIS 8TH DAY OF MAY 1991.

APPENDIX E

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone (602) 542-9396
Noel K. Dessaint
Kathleen E. Kempley
Clerk of Court
Chief Deputy Clerk

December 21, 1995

RE: FAITH AITKEN vs. INDUSTRIAL COMM OF AZ/AMPHITHEATER PUBLIC SCHOOLS et al
Supreme Court No. CV-92-0257-PR
Court of Appeals No. 2 CA-IC 91-0042
Industrial Commission No. 374-78-9448 / Carrier No. A065140

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 19, 1995, in regard to the above-referenced cause:

ORDERED: Motion for Leave to Join in Support of Motion for Reconsideration as Amicus and to File Amicus Brief = GRANTED. The Clerk shall file the Amicus Brief.

FURTHER ORDERED: Motion for Reconsideration = DENIED.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO: [All counsel]

APPENDIX F

SUPREME COURT OF ARIZONA

FAITH AITKEN,

Petitioner Employee,

v.

INDUSTRIAL COMMISSION OF ARIZONA

Respondent,

AMPHITHEATER PUBLIC SCHOOLS,

Respondent Employer,

UNIGARD INSURANCE COMPANY,

Respondent Carrier.

Supreme Court No. CV-92-0257-PR

Court of Appeals No. 2 CA-IC 91-0042

Industrial Commission No. 374-78-9448

Carrier No. A056140

M A N D A T E

TO: Industrial Commission of Arizona, in relation to Claim No. 374-78-9448

The above entitled and numbered cause was brought before Division Two of the Court of Appeals, No. 2 CA-IC 91-0042, for review by special action. That Court filed its Opinion on the 14th day of May, 1992. A

Petition for Review was granted by this Court on the 12th day of January, 1993.

This Court, having considered the matter, filed its Opinion of the 17th day of October, 1995, setting aside the award entered in the above entitled cause.

The Opinion of the Court of appeals is vacated; the Commission's award is set aside, and the case is remanded to the Industrial Commission.

A Motion for Reconsidered was filed and was denied by order of this Court on the 19th day of December, 1995.

NOW, THEREFORE, YOU ARE COMMANDED that such proceedings be held in this matter as shall be required to comply with the is Court's Opinion (copy attached to this original mandate).

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 18th day of January, 1996.

NOEL K. DESSAINT, Clerk
TO: [All Counsel]

APPENDIX G

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Amendments to the United States Constitution

1. FIFTH AMENDMENT.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. FOURTEENTH AMENDMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State

shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes

3. 28 U.S.C. § 1257

§ 1257. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by write of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the terms "highest court of a State" includes the District of Columbia Court of Appeals.

4. 28 U.S.C. § 2403(b)

§ 2403(b): In any action, suit, or proceeding in a court

of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Arizona Statutes

5. Ariz.Rev.Stat.Ann. § 12-2506 (prior to 1993 amendments, and in effect when the Administrative Law Judge issued his Findings and Award on May 8, 1991, and his Decision upon Review Affirming the Award, on August 6, 1991, and when the Arizona Court of Appeals issued its opinion in Aitken v. Industrial Commission on May 14, 1992)

§ 12-2506. Joint and several liability abolished; exceptions; apportionment of degrees of fault; definitions

A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be

entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

B. In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

C. The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

D. The liability of each defendant is several only and is not joint, except that:

1. A party is responsible for the fault of another person, or for payment of the proportionate share of another party, if both parties were acting in concert or if a person was acting as an agent or servant of the party.

2. Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.

E. If a defendant is found jointly and severally liable pursuant to subsection D, the defendant has the right to contribution pursuant to this chapter.

F. As used in this section:

1. "Acting in concert" means pursuing a common plan or design to commit a tortious act and actively taking part in it.

2. "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

6. Ariz.Rev.Stat.Ann. § 12-2506 (with 1995 amendments, in effect when Supreme Court of Arizona issued its opinion in Aitken v. Industrial Commission on October 17, 1995.)

§ 12-2506. Joint and several liability abolished; exceptions; apportionment of degrees of fault; definitions

A. In an action for personal injury, property damage or wrongful death, the liability of each defendant for damages is several only and is not joint, except as otherwise provided in this section. Each defendant is liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be entered against the defendant for that amount. To determine the amount of judgment to be entered against each defendant, the trier of fact shall multiply the total amount of damages recoverable by the plaintiff by the percentage of each defendant's fault, and that amount is the maximum recoverable against the defendant.

B. In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of a nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with requirements established by court rule, that a nonparty was wholly or partially at fault. Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties. Assessment of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.

C. The relative degree of fault of the claimant, and the relative degrees of fault of all defendants and nonparties, shall be determined and apportioned as a whole at one time by the trier of fact. If two or more claimants have independent claims, a separate determination and apportionment of the relative degrees of fault of the respective parties, and any nonparties at fault, shall be made with respect to each of the independent claims.

D. The liability of each defendant is several only and is not joint, except that:

1. A party is responsible for the fault of another person, or for payment of the proportionate share of another person, if both the party and the other person were acting in concert or if the other person was acting as an agent or servant of the party.

2. Nothing in this section prohibits the imposition of joint and several liability in a cause of action relating to hazardous wastes or substances or solid waste disposal sites.

E. If a defendant is found jointly and severally liable pursuant to subsection D, the defendant has the right to contribution pursuant to this chapter.

F. As used in this section:

1. "Acting in concert" means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert does not apply to any person whose conduct was negligent in any of its degrees rather than intentional. A person's conduct which

provides substantial assistance to one committing an intentional tort does not constitute acting in concert if the person has not consciously agreed with the other to commit the intentional tort.

2. "Fault" means an actionable breach of legal duty, act or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all of its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability and misuse, modification or abuse of a product.

7. Ariz. Rev. Stat. Ann. § 23-1023

§ 23-1023. Liability of third person to injured employee; election of remedies

A. If an employee entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in event of death his dependents, may pursue his remedy against such other person.

B. If the employee entitled to compensation under this chapter, or his dependents, does not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the insurance carrier, or to the person liable for the payment thereof. Such a claim so assigned may be prosecuted or compromised by the insurance carrier or the person liable for the payment thereof, or may be reassigned in its entirety to the employee or his

dependents. After the reassignment, the employee entitled to compensation, or his dependents, shall have the same rights to pursue the claim as if it had been filed within the first year.

C. If he proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

8. Rule 22, 17B, Ariz.Rev.Stat.Ann, Arizona Rules of Civil Appellate Procedure (including historical notes)

ARIZONA REVISED STATUTES ANNOTATED

RULES OF CIVIL APPELLATE PROCEDURE

Current with Amendments received through August 1, 1995

Rule 22. Motion For Reconsideration

(a) Necessity. The filing of a motion for reconsideration in the Court of Appeals is not a prerequisite to the filing of a petition for review pursuant to Rule 23.

(b) Time for Filing; Response. Any party desiring reconsideration of a decision of an appellate court may file a motion for reconsideration in the appellate court within fifteen days after the filing of a decision by the appellate court. The motion shall not be amended except by leave of court.

No response to a motion for reconsideration will be filed unless requested by the Court, but a motion for reconsideration will not be granted in the absence of such a request.

(c) Contents. A motion for reconsideration shall be directed solely to discussion of those specific points or

matters in which it is claimed the appellate court erred in determination of facts or law. Neither the motion for reconsideration nor the response shall exceed fifteen pages.

(d) Motions Not Permitted. Unless permitted by specific order of the appellate court, no party shall file a motion for reconsideration of (1) an order denying a motion for reconsideration; (2) an order denying a petition for review; or (3) an order declining to accept jurisdiction of a petition for special action.

CREDIT(S)

1988 Main Volume

Amended April 28, 1983, effective Sept. 1, 1983.

1995 Pocket Part

Amended June 24, 1993, effective Dec. 1, 1993; Feb. 24, 1994, effective June 1, 1994.

HISTORICAL NOTES

COMMENT TO 1993 AMENDMENT

1995 Pocket Part

The purpose of the 1993 amendment to Rule 22(b), which precluded responses to motions for reconsideration except upon request by the court, was to avoid the significant and in most cases unnecessary legal expense incurred in connection with motions for

reconsideration. A parallel change was made in Rule 31.18(b), Rules of Criminal Procedure.

COMMENT

1988 Main Volume

The 1983 amendments to Rules 22 and 23 change the procedures for post-decision review in the Court of Appeals and the Supreme Court. Motions for rehearing are eliminated. They are replaced by much more limited motions for reconsideration which are in order only when an opinion should be changed because of an error of fact or law. Such errors are intended to be narrowly defined. Parties filing motions for reconsideration should be able to point to specific misstatements of fact or statutory or decisional law.

Disagreements with opinions of the Court of Appeals based upon questions of policy, analysis and interpretation should be presented to the Supreme Court by petition for review. As stated in Rule 22(a), filing of a motion for reconsideration is not required before a party petitions for review in the Supreme Court.